Public Prosecutor v Ka Lian Logistics Sdn Bhd & Ors

HIGH COURT (KOTA KINABALU) — CRIMINAL APPLICATION NO BKI-44–12/9 OF 2017
NURCHAYA ARSHAD J
25 JANUARY 2018

Criminal Procedure — Forfeiture — Seizure of property — Application to forfeit seized property as proceeds from unlawful activity — Whether conditions established — Whether vehicles seized subject matter relating to commission of offence — Whether application to cause a notice to third parties published in gazette should be allowed — Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 4(1) & 56

This was an application by the prosecution to cause a notice to the third parties to be published in the *gazette* and subsequently to forfeit all the seven prime mover lorry belonging to the first respondent under s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act'). This case related to custom tax evasion by the respondent. It involved 31 containers containing beers amounting to RM1,658,545.88 without import license which was an offence under s 135(1)(a) of the Customs Act 1967. Further investigation also led to further discovery of smuggling of containers. The company's assets were seized as a result, of which the first respondent had obtained and used the said vehicles in a legal manner without any intention or apparent act in its business transaction to an unlawful dealings. The issues raised were: (a) whether the seven vehicles seized were the subject matter relating to the commission of an offence under the Act; and (b) whether applicant's application to cause a notice to third parties to be published in the *gazette* should be allowed.

Held, dismissing the applicant's application:

(1) The applicant had to prove its case on a balance of probabilities. The predicate offence must be proved first before proving the offence under s 4 of the Act. Only then the court could proceed to consider s 56 of the Act. It was a requirement that the offence must be proved before the court made the forfeiture order. There was nothing to connect the predicate offence to the seized vehicles as the first respondent was doing an entirely different from what the prosecution alleged them. The first respondent was paid to deliver the goods and it was not their duty to ensure all papers were in order. To come and seize the first respondent's assets later in the year for an offence committed by someone else was in fact mala fide. The court disagreed with the prosecution that the vehicles were proceeds from

illegal activities as those vehicles were bought way back before the allegation started and all the vehicles were financed by the bank. The vehicles seized from the first respondent were not proven to be the subject matter relating to the commission of an offence under s 4(1) of the Act or proceeds of an unlawful activity (see paras 11 & 15–17).

(2) Since the vehicles seized were not proven or even related to the commission of an offence under s 4(1) of the Act, the applicant's application for notice to the third parties to be published in the *gazette* was not allowed (see para 18).

[Bahasa Malaysia summary

Ini adalah permohonan oleh pihak pendakwaan untuk menyebabkan notis kepada pihak ketiga untuk diterbitkan dalam *warta* dan kemudiannya menyita semua tujuh lori sewa utama milik responden pertama di bawah s 56(1) Akta Pencegahan Pengubahan Wang Haram, Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 ('Akta'). Kes ini berkaitan dengan pengelakan cukai kastam oleh responden. Ia melibatkan 31 bekas mengandungi bir berjumlah RM1,658,545.88 tanpa lesen import yang merupakan kesalahan di bawah s 135(1)(a) Akta Kastam 1967. Penyiasatan lanjut juga membawa kepada penemuan selanjutnya mengenai penyeludupan kontena. Akibatnya aset syarikat telah dirampas, yang mana responden pertama telah memperoleh dan menggunakan kenderaan tersebut dengan cara yang sah tanpa niat atau tindakan jelas dalam urus niaga perniagaannya untuk urusan yang menyalahi undang-undang. Isu-isu yang dibangkitkan adalah: (a) sama ada tujuh kenderaan yang disita adalah perkara yang berkaitan dengan pelakuan suatu kesalahan di bawah Akta; dan (b) sama ada permohonan pemohon untuk menyebabkan notis kepada pihak ketiga untuk diterbitkan dalam *warta* perlu dibenarkan.

Diputuskan, menolak permohonan pemohon:

(1) Pemohon perlu membuktikan kesnya di atas imbangan kebarangkalian. Kesalahan predikat hendaklah dibuktikan terlebih dahulu sebelum membuktikan kesalahan di bawah s 4 Akta. Hanya kemudian mahkamah boleh meneruskan untuk mempertimbangkan s 56 Akta. Ia adalah syarat bahawa kesalahan tersebut mesti dibuktikan sebelum mahkamah membuat perintah penyitaan tersebut. Tiada apa-apa untuk menghubungkan kesalahan predikat kepada kenderaan yang dirampas kerana responden pertama melakukan yang sama sekali berbeza daripada apa yang dituduh oleh pihak pendakwaan. Responden pertama dibayar untuk menyampaikan barang-barang dan bukan tugas mereka untuk memastikan semua kertas teratur. Untuk datang dan menyita aset responden pertama kemudian pada tahun tersebut kerana kesalahan yang dilakukan oleh orang lain sebenarnya mala fide. Mahkamah tidak bersetuju dengan pihak pendakwaan bahawa kenderaan tersebut adalah

A hasil daripada kegiatan yang tidak sah kerana kenderaan itu dibeli semula sebelum tuduhan itu dimulakan dan semua kenderaan dibiayai oleh bank. Kenderaan yang disita daripada responden pertama tidak terbukti menjadi perkara yang berkaitan dengan pelakuan kesalahan di bawah s 4(1) Akta atau hasil aktiviti yang menyalahi undang-undang (lihat perenggan 11 & 15–17).

B

(2) Oleh kerana kenderaan yang disita tidak terbukti atau bahkan berkaitan dengan pelakuan kesalahan di bawah s 4(1) Akta, permohonan pemohon untuk notis kepada pihak ketiga untuk diterbitkan dalam *warta* tidak dibenarkan (lihat perenggan 18).]

C

Notes

For cases on seizure of property, see 3(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2609–2610.

D

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 2(1), 4(1), (1)(a), (1)(b), 56, 56(1)

Customs Act 1967 s 135(1)(a)

E

Nik Haslinie Hashim (Deputy Public Prosecutor, Attorney General's Chambers) for the applicant

Hairul Vaiyron (Hairul Vaiyron & Co) for the respondent.

F

Nurchaya Arshad J:

BRIEF FACTS

G

[1] This is an application by the prosecution to cause a notice to third parties to be published in the *gazette* and subsequently to forfeit:

(a) Prime Mover Lorry Made by Beiben Model CWT2540SZ-v3.345 year 2013 with registration No SAB9732P belonging to the first respondent;

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(b) Prime Mover Lorry made by Nissan Model CW631G (RB/AA) year 2007 with registration No SS4111K belonging to the first respondent;

(c) Prime Mover Lorry made by Nissan Model CK481 (RB/JE290) year 2011 with registration No SAB1809E belonging to the first respondent;

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(d) Prime Mover Lorry made by Nissan Model GK4 (RB/HIR P02) year 2015 with registration No SAB5390Y belonging to the first respondent;

(e) Prime Mover Lorry made by ERF Model ERF EC11 year 2001 with registration No SAA119J belonging to the first respondent;

(f) Prime Mover Lorry made by Nissan Model CW631GNT (RB/LA042) year 2007 with registration No SAA1578R belonging to the first respondent; and

(g) Prime Mover Lorry made by Nissan Model CW610GNT TRACTOR HEAD year 1998 with registration No SAA6979E belonging to the first respondent.

[2] Briefly, this case relates to custom tax evasion by the respondent. It involves 31 containers containing beers amounting to RM1,658,545.88 without import license which is an offence under s 135(1)(a) of the Customs Act 1967. Further investigation also lead to further discovery of smuggling of containers. The company's assets were seized as a result, of which the first respondent has obtained and used the said vehicles in a legal manner without any intention or apparent act in its business transaction to an unlawful dealings.

THE LAW

[3] Section 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFA') under which the application for the forfeiture of the respondents' monies in various bank accounts is made is reproduced herein for easy reference:

> 56 Forfeiture of property where there is no prosecution
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> (1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is:
>
> (a) *the subject-matter or evidence relating to the commission of such offence;*
>
> (b) *terrorist property;*
>
> (c) *the proceeds of an unlawful activity; or*
>
> (d) *the instrumentalities of an offence.*
>
> (2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied:
>
> (a) that the property is:
>
> (i) *the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;*
>
> (ii) *terrorist property;*
>
> (iii) *the proceeds of an unlawful activity; or*

(iv) *the instrumentalities of an offence; and*

(b) that there is no purchaser in good faith for valuable consideration in respect of the property.

(3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

(4) In determining whether the property is:

(a) *the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;*

(b) *terrorist property;*

(c) *the proceeds of an unlawful activity; or*

(d) *the instrumentalities of an offence,*

the court shall apply the standard of proof required in civil proceedings.

[4] This section gives the power to the public prosecutor to apply for forfeiture of property in respect of which there is no prosecution for an offence under s 4(1) and the power of a judge of the High Court to make an order for the forfeiture of such property.

[5] It also the interpretation of s 56(1), that the property which is subject to a forfeiture order must be the property seized under the AMLATFA and that there is no prosecution or conviction for an offence under s 4(1).

[6] It is the requirement of the section that such application must be made before the expiration of twelve months from the date of the seizure of the property in question, or where there is a freezing order, twelve months from the date of the freezing, failing which the property shall be released to the person from whom it was seized. This condition was also fulfilled by the prosecution as the application was made on 29 September 2017 while the so-called 'seizure' was executed on 29 September 2016 and clearly within the time frame specified under s 56(1).

[7] Since the requirements have been met, the properties which are the subject matter of or evidence relating to the commission of the offence under s 4(1) *MUST* be satisfied before the prosecution can make the application.

[8] The AMLATFA by virtue of s 2(1) applies, inter alia, to any serious offence or unlawful activity. The respondent's case is that the seven vehicles seized were in connection with an offence under s 4(1)(a) and s 4(1)(b) which reads:

4 Offence of money laundering

(1) Any person who:

(a) *engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence*;

(b) *acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence*;

...

commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of an offence at the time the offence was committed or five million ringgit, whichever is the higher.

ISSUES

Whether the seven vehicles seized are the subject matter relating to the commission of an offence under s 4(1) of the AMLATFA

[9] In this case, the consignee was Everich Resources Sdn Bhd and Kinabalu Eagle Import & Export Sdn Bhd. They are the owners of the goods inside the containers dragged by the first respondent's prime mover. The consignee's application was approved and released by the Customs Department and Port Management. The first respondent then delivered the containers that was cleared from the port to the destination as required.

[10] The first respondent was only paid to deliver its services (similar like a courier service). As for the consignee, it is their job to get the clearance of the containers from the port authorities and other relevant authorities ie, Customs Department. In event that there were any problems with the clearance, the containers will not be released.

[11] In this application, the applicant has to prove its case on a balance of probabilities. The predicate offence must be proved first before proving the offence under s 4(1) of the AMLATFA. Only then the court could proceed to consider s 56 of the AMLATFA. It is a requirement that the offence must be proved before the court makes the forfeiture order.

[12] The law is very clear to require the applicant to prove that the vehicles are proceeds of illegal activities. The illegal activity in question relates to the predicate offence under s 135(1)(a) of the Customs Act. The failure to do so would mean that they have not proven the predicate offence and subsequently the offence under s 4(1).

[13] The owner of the goods is Everich Resources Sdn Bhd and Eagle Import & Export Sdn Bhd. The first respondent is paid by the owner of goods to deliver the goods to a destination. By right, the owner of goods are the ones who will have to declare, apply out of port, comply with shipping procedures, etc. The first respondent is just merely delivering the said goods to the owner of the goods (similar like courier service ie, Poslaju). All containers are sealed by the supplier and there is no way that the first respondent will know/can check whether it is against business procedures/the law. I just find the whole process 'suspicious' because the port management and the custom cleared the consignee's application in the first place and subsequently the goods were taken out of the port. However, seven months later, the Custom Department came to their office with documentation alleging them that the said vehicles was used for illegal transportation of several unpaid duty beers. If there were suspicion or allegation in the first place, why didn't the custom stop them while they were in the port? Why was there a clearance? Who gave the clearance?

[14] Secondly, the offence took place in February 2016 but in September, the custom came to the first respondent office and seized their assets.

[15] Here, I find there is nothing to connect the predicate offence to the seized vehicles, as the first respondent is doing an entirely different business from what the prosecution alleged them. The first respondent was PAID to deliver the goods. It is not their duty to ensure all papers are in order. It was the consignee's papers that SHOULD be in order which was reflected in this case as the goods have been taken out from the port itself. The transaction was cleared, meaning papers are in orders. Therefore, to come and seize first respondent's assets later in the year for an offence committed by someone else is in fact MALA FIDE.

[16] I also do not agree with the prosecution that the vehicles are said to be proceeds from illegal activities as those vehicles were bought way back before the allegation started and on top of it, all the vehicles are financed by the bank.

[17] That being so, the vehicles seized from the first respondents are *NOT* proven to be the subject-matter relating to the commission of an offence under sub-s 4(1) of the Act or proceeds of an unlawful activity (offence under s 135(1)(a) of the Custom Act).

Whether the applicant's application to cause a notice to third parties to be published in the gazette should be allowed

[18] Since the vehicles seized were not proven or even related to the commission of an offence under s 4(1) of the act, applicant's application for notice to third parties to be published in the *gazette* is not allowed.

[19] After reading all the affidavits, submissions by both parties and evidence attached therein, I therefore dismissed notice of motion dated 26 September 2017 with no order as to costs.

The applicant's application dismissed.

Reported by Mohd Kamarul Anwar